IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/07/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.497 of 2002

Murugan .. Appellant

-Vs-

State
Inspector of Police
NIB/CID Thuthukudi .. Respondent

This criminal appeal is preferred under S.374 of The Code of Criminal Procedure against the judgment of the Special District and Sessions Judge, Madurai (Court constituted for N.D.P.S. Act cases, Madurai) made in C.C.No.33 of 1999 dated 10.9.2001.

!For Appellant : Mr.T.Munirathinam Naidu

^For Respondent : Mr.O.Srinath,
Government Advocate (Crl. Side)

:JUDGMENT

The sole accused, who stood charged, tried and convicted and sentenced to undergo R.I. for 10 years under S.8(c) r/w 18 of the N.D.P.S. Act and to pay a fine of Rs.1.00 lakh and in default to undergo R.I. for 2 years has brought forth this appeal.
2. Short facts necessary for the disposal of this appeal are:
P.W.6 Beski, Sub Inspector, attached to NIB/CID, on receipt of an information on 15.10.1998 at about 10.00 A.M. as to the transport of narcotic substance, reduced the same into writing and informed the same by telephone to P.W.7 Jeyakumar, Inspector. He accompanied by P.W.1 H.Velusamy, Village Administrative Officer and his menial proceeded to the Central Bus Stand, Tuticorin, where two persons were identified in front of Paul Sornam Lodge. Of those two persons, the appellant/accused was one. In the presence of the witnesses, they were enquired. The appellant and the other person informed that they were in possession of two kilos of abin each. They were informed of their right that they could be searched before a Magistrate or before a gazetted Officer, and the same was replied not necessary. Under such circumstances, in the presence of the witnesses, the appellant and the other person produced the parcels what they kept secret in their waist, and the parcel produced by the appellant was unfolded. It was weighed in the presence of the witnesses. The samples were taken, and they were given mark, and the

rest was also put in a parcel, and they were also given mark as B1 and B2. The seizure athatchi was prepared and signed by the witnesses. The accused was arrested and remanded to judicial custody. A report was sent to the Inspector, marked as Ex.P10 . The F.I.R., the samples and the rest of the seized contraband all were produced before the concerned Magistrate's Court on the same day. On requisition, the samples were sent for analysis, while the rest was returned to the Inspector to be kept in his custody. On 21.10.1 998, the samples were sent for analysis, and they were accordingly done and found to be a narcotic substance, according to the evidence of P.W.6. On completion of the investigation, P.W.7 filed the charge sheet under S.8(c) r/w 18 of the NDPS Act.

3. In order to prove the charge levelled against the appellant/ accused, the prosecution examined 7 witnesses and marked 12 exhibits and 3 material objects. When the appellant/accused was questioned under S.313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses, he denied the same as false. No defence witness was examined. After consideration of the rival submissions and materials available, the trial Court found him guilty under S.8(c) r/w 18 of NDPS Act and sentenced him as referred to above.

4. Arguing for the appellant, the learned Counsel interalia raised the following points:

(a) The first line of attack was that the place where the appellant, according to the prosecution, was intercepted and seizure was made, was the place within the compound of one Sornam Lodge, and hence, even as per the evidence available, it was a private place, and under such circumstances, the mandatory provisions of S.42 of the NDPS Act should have been followed, but in the instant case, it was not done so, and thus, it was fatal to the prosecution case, and the lower Court should have rejected the case of the prosecution. In order to substantiate the same, the learned Counsel relied on the following decisions: (1) 1997 Crl.L.J. 513; (2) 1998 Crl.L.J. 132 and (3) 2000 Crl.L. J. 1384.

(b) The second point that was raised by the learned Counsel was that according to the prosecution case, the seizure was made on 15.10.98, and the contraband seized along with the samples were produced before the concerned Magistrate's Court only on 16.10.98 and again produced before the said Court on 20.10.98; and that there is no evidence to show in whose custody the contraband was from 16.10.98 to 20.1 0.98.

(c) Even for sending the samples for analysis, a huge delay has been noticed, and apart from that, 25 grams of samples was seized and sent for analysis. But according to the evidence of P.W.5 Analyst, the samples that was sent weighed only 19.16 gram, and there was no possibility of loss of weight when once it was sealed and brought for analysis, and thus, the prosecution has not explained the said deficiency.

(d) The final report of the entire prosecution case should have been sent to the immediate superiors by the concerned Officer as required by S.57 of the NDPS Act. Though it was not mandatory, it has got to be taken into consideration along with the other aspects of the matter, which would no doubt affect the prosecution case. From the evidence of P.W.10, it would be clear that no such report was received by him, and under the circumstances, the lower Court should have rejected the case of the prosecution, and in view of the above noncompliance of the mandatory provisions of the Act, the accused is

entitled for an acquittal.
5. In answer to the above contentions, the learned Government Advocate (Criminal Side) would urge that the prosecution by proper and sufficient evidence has proved that the appellant/accused was in possession of the contraband namely 2 kilos of abin, and after following the procedural formalities, they were seized; that the place of interception and seizure was only a public place, and hence, no question would arise as to the compliance of S.42 of the NDPS Act, but, in the circumstances, it would attract only S.43 of the Act; that so far as the full report was concerned, the provisions under S.57 of the Act does not spell any mandate, but, in the instant case, there is available evidence to show that actually such a report was perused by P.W.7, the next day; that according to the prosecution case, 25 grams of abin was taken as samples from the seized contraband and was produced before the concerned Magistrate's Court, which has accordingly been sent for analysis, and in such circumstances, the fact to that extent has been proved, and hence, the contention that 19.16 grams, according to P.W.1's evidence, was available at the time of test, which is less than what has been taken naturally cannot be given much weight, as the prosecution agency had no hands to do anything in the same, and therefore, the lower Court was perfectly correct in convicting the appellant/accused, and the judgment of the lower Court has got to be sustained.
6. This Court has given its sincere and earnest consideration on the contentions put forth by either side. The Court is of the firm view that there is no substance in this appeal.
7. The prosecution has proved through the evidence of P.W.1 V.A.O., an independent witness that on 15.10.1998 at about 10.00 A.M. P.W.1 after informing the right of the appellant as to the search as contemplated under S.50 of the NDPS Act made a search of the packet which he voluntarily produced and found two kilos of opium which was seized in the presence of the witnesses under the mahazar. Samples have been taken, and in doing so also, procedure has been followed. All the samples and the contraband were produced before the concerned Magistrate's Court, and there is endorsement available to show that on production, the rest of the contraband namely 1950 grams, the remainder, except the sample, was returned to be kept in the custody of the Department, and the same was in the custody of the Department till 20.10.19 98. It was produced before the said Court. Therefore it is futile on the appellant's side to state that there is no evidence as to the custody of the same from the period 16.10.98 to 20.10.98. From the available evidence, it would be clear that it was in the custody of the Department. The samples have been subjected to test, and the narcotic substance has been found, as per the evidence of P.W.5 Analyst. Regarding the loss after the samples were taken and before the test was made, the Court cannot give much weight. In this context, the decision of the Apex Court reported in AIR 1999 SUPREME COURT 2355 (PON ADITHAN V. DEPUTY DIRECTOR, NARCOTICS CONTROL BUREAU, MADRAS) and relied on by the learned Government Advocate has got full application to the case on hand. On that account, no doubt can be cast on the prosecution case.
8. The Court is unable to agree with the contention of the appellant's side that the search was made not in a public place, but within the compound of the said lodge, and hence, mandatory provision of S.42 of the NDPS Act should have been complied with, in view of the fact that from the available materials and that the witnesses have clearly spoken to that effect.

That apart, it is found in the mahazar "giHa g!; epiyak;. EiHt[thapy; mUnf cs;s ghy; brhh;zk; yhl;;$; Kd;g[itj; J". This place where the search and seizure was made cannot at any stretch of imagination be taken to be as a private place. Needless to say that it was a public place. It has been held by the Apex Court in a decision reported in (2002) 8 SUPREME COURT CASES 7 (NARAYANASWAMY RAVISHANKAR VS. ASSTT. DIRECTOR, DIRECTORATE OF REVENUE INTELLIGENCE) that if search and seizure are conducted in a public place, in such case, S.43 of the NDPS Act is applicable and not S.42 of the Act, and hence, the question of non-compliance, if any, of the provisions under S.42 of the NDPS Act in the instant case was wholly irrelevant. Applying the said decision of the Apex Court, the said contention of the appellant's side does not carry any substance.

9. In the light of the above reasons, the Court is of the view that there is no merit in this appeal, and the same deserves to be dismissed. However, the Court is of the opinion that the default sentence awarded by the trial Court namely 2 years R.I. has got to be reduced.

10. Therefore, the default sentence of R.I. for 2 years imposed by the lower Court is modified, and in default of payment of fine awarded by the lower Court, the appellant/accused shall undergo R.I. for six months. In other respects, the judgment of the lower Court is confirmed. With the above modification, this criminal appeal is dismissed.

Index: Yes
Internet: Yes

To:

1) The Special District and Sessions Judge-NDPS, Madurai.
2) The Principal District and Sessions Judge, Madurai.
3) The Superintendent, Central Prison, Madurai.
4) The Public Prosecutor, High Court, Madras.
5) The D.I.G. of Police, Chennai 4.
6) Mr.O.Srinath, Government Advocate (Crl. Side), High Court Madras
7) The Inspector of Police, NIB/CID, Thuthukudi.

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